

**Homeland
Security**

Department of Homeland Security
Border Wall Plan Pursuant to Presidential Proclamation 10142
June 9, 2021

I. PURPOSE

On January 20, 2021, President Biden issued Proclamation 10142, *Termination of Emergency with Respect to the Southern Border of the United States and Redirection of Funds Diverted to Border Wall Construction* (the Proclamation). The Proclamation directed a pause in the construction of the southern border wall and on the obligation of funds for such construction projects to allow the Department of Homeland Security (DHS or the Department) and the Department of Defense (DoD) to:

- (1) assess the legality of the funding and contracting methods used to construct the wall;
- (2) assess the administrative and contractual consequences of ceasing each wall construction project; and,
- (3) develop a plan for redirecting funds and repurposing contracts as appropriate and consistent with applicable law.

DHS has, without deobligating funds,¹ suspended performance of all border barrier contracts and southwest border barrier construction activities, with the exception of activities related to ensuring project sites are safe and secure in accordance with the terms and conditions of the contracts. DHS has also completed the required assessments.

This memorandum outlines DHS's Plan pursuant to section 2 of the Proclamation for the redirection of funds appropriated or received from the Treasury Forfeiture Funds (TFF) for the construction of a border barrier at the southern border of the United States. These activities support the Administration policy to protect national and border security and address the humanitarian challenges at the southern border while remaining consistent with President Biden's commitment that "no more American taxpayer dollars [should] be diverted to construct a border wall."

¹ DHS has continued to pay invoices in accordance with its obligations under existing contracts.

II. DHS SECRETARY'S EXCEPTIONS

DHS is continuing certain discrete projects because they are urgent measures needed to avert immediate physical dangers.

As provided for in Section 1(b) of the Proclamation, the Secretary of Homeland Security granted an exception to the border wall construction pause for activities that are "urgent measures needed to avert immediate physical dangers." DHS has re-initiated activity on two projects to protect life and safety under the Secretary's exception. The first is a project in the Rio Grande Valley of Texas, where DHS will construct and/or remediate approximately 13.4 miles of compromised levee. The second is an erosion control project in the San Diego area along an approximately 14-mile stretch of recently constructed barrier and associated adjacent road necessary to protect migrants, agents, and residents. DHS will not engage in standard environmental planning for the work described above. Rather, given the urgency with which such work must be undertaken, the work described above is proceeding under previously-issued Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) waivers that are applicable to the projects and activities.

III. PLAN FOR FISCAL YEAR (FY) 2017-2020 DHS APPROPRIATIONS

DHS may prioritize projects other than those described in Section II for completion if they are needed to address life, safety, environmental, or other remediation requirements.

DHS will explore use of its appropriated funds to address construction previously funded with Treasury Forfeiture Fund amounts (discussed further below). Examples of work to be performed include grading roads and cutting slopes to resolve drainage and ponding; addressing exposed rebar; and installing canal crossings. No additional real estate acquisition is required to complete this work.

For all other projects funded by the FY 2017 – FY 2020 DHS appropriations, prior to further construction, DHS will undertake a thorough review and replanning process, including the following steps.

- A. To the extent DHS, in its discretion, deems it warranted, it may rescind or revise waivers of environmental and other laws issued under IIRIRA by the Secretary of Homeland Security. For some segments, rescinding or revising prior environmental waivers will not be feasible.
- B. For all activities or projects that will continue, with the exception of the projects and activities set forth in Section II above or projects necessary to address life, safety, environmental, or other remediation requirements, regardless of whether an applicable IIRIRA waiver is rescinded or revised, DHS intends to engage in standard environmental planning including taking certain actions consistent with National Environmental Policy Act (NEPA) and other environmental planning and statutes. DHS intends to undertake a multistep environmental planning process, which will include public scoping and comment on potential environmental impacts through the NEPA process.

- C. DHS, working with interagency partners such as the U.S. Fish and Wildlife Service, intends to assess the extent to which border wall funds may be used to remediate or mitigate environmental damage caused by past border wall construction. Opportunities for mitigation will be identified through the environmental planning process, including NEPA.
- D. DHS intends to enter into robust and substantive consultation with stakeholders, including affected landowners, tribes, border community residents, their elected representatives, and interested non-governmental organizations and advocates. Such consultation will inform environmental planning and execution of the border wall projects.
- E. DHS intends to review the status of all pending border wall land eminent domain actions commenced between 2016 and 2020 and reassess the extent to which acquiring parcels of land that are the subject of such actions will be necessary after environmental planning activities are completed. This reassessment process will include a review of existing construction plans to determine whether they can be modified to reduce the use of land previously acquired through adverse eminent domain proceedings. If DHS determines that it no longer requires the use of land that is currently the subject of an adverse eminent domain proceeding, DHS will explore options to revest the land with its prior owners.

If DHS determines that additional land acquisition is necessary to complete projects contemplated by this plan, DHS will initiate robust landowner engagement and be guided by the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, as amended, 42 U.S.C. §§ 4601-4655. It is DHS's preference to obtain real estate interests on a voluntary basis through negotiated offers to sell (OTS). Condemnation action to acquire additional land will be considered only as a last resort, with a focus on life, safety, environmental, or other remediation requirements. In those instances where condemnation action is required in order to obtain a permanent real estate interest, DHS's authorized official will notify the Secretary, or the Secretary's designee, prior to proceeding with the action.

IV. PLAN FOR FY 2021 DHS APPROPRIATIONS

In FY 2021, DHS received funding for construction of border barrier systems along the southwest border.

A. Contingency Funding

Due to unforeseen delay and other costs, several projects may require additional obligations to address necessary changes and/or cost overruns.

i. Levee Wall Described in Section II

DHS estimates up to an additional \$275 million in cost overrun due to the existing suspension of contract performance for construction as well as design changes. These will be funded through existing FY 2021 appropriations.

ii. Other

DHS anticipates being able to cover other delay costs and changes as a result of the suspension of contract performance using the appropriated funds from the year in which the project was funded. However, the exact financial impacts of the delay and changes must be negotiated with each contractor. Until final costs are negotiated, DHS cannot preclude the possibility that additional contingency funding may be required to cover delay and change costs. If such funding is required, it will be drawn from existing FY 2021 appropriations.

B. Close out/Remediate Barrier Projects Turned Over to DHS by the Department of Defense (DoD)

DHS expects DoD will turn over multiple barrier projects, previously executed with military construction or counter-drug funding, in various stages of completion. DHS will need to absorb some potentially significant costs related to DoD's discontinued border wall projects. Many, if not all, of the DoD military construction-funded projects will require additional obligations from existing FY 2021 appropriations, and it is possible that DHS may also need to obligate some additional funds related to the projects funded with DoD counter-drug appropriations. Work on the DoD projects may include but is not limited to the following:

- Completing construction of site drainage features to allow for positive drainage of the sites, ensuring no ponding, including grading sites, and installing and/or completing low water crossings and other drainage structures;
- Installing/completing permanent erosion control/slope stabilization measures to ensure constructed assets are safe and stable for their expected life cycle;
- Finishing the construction of the patrol, maintenance, and access roads to standard to ensure safe ingress/egress including guardrails and signage, and integration with existing roadways;
- Remediating temporary use areas (i.e., laydown yards, haul roads) and project areas impacted by construction; and
- Disposing of residual materials not required for completion of the work as identified above.

No new barrier construction work will occur on the DoD projects. While DHS believes that some of the work described above may comport with the FY 2021 appropriations language, there may be limitations on the type of work that DHS can undertake. The specific amount of funding required will depend upon the condition of the DoD projects and the amount of work DHS can undertake.

For DHS's work on the DoD military construction funded barrier projects, DHS intends to engage in standard environmental planning including taking certain actions consistent with NEPA. The DoD counter-drug projects were executed under 10 separate waivers issued by the

Secretary Homeland Security pursuant to IIRIRA between April 2019 and March 2020. For DHS's work required on the DoD counter-drug projects, DHS intends to apply the criteria outlined in Section III above; however, DHS may forego standard environmental planning and rely on prior IIRIRA waivers where DHS must take timely action to settle pending litigation, including, but not limited to, actions to repair private property damaged by wall construction, remediate damage of natural, historic, or cultural resources, or avert further environmental damage or degradation due to unaddressed site conditions.

C. Planning approach with NEPA for other projects

DHS will use any remaining FY 2021 funding available, after budgets for the activities above are established, to begin the sequential project planning process for the next highest priority barrier segments identified by DHS. Initially, DHS will prioritize projects required for life, safety, environmental, or other remediation requirements. The process will begin with environmental planning that complies with NEPA. In order to facilitate the NEPA process, DHS will seek Rights of Entry from landowners to allow temporary access to perform environmental, cultural, and other survey work. Contract solicitation would occur after NEPA and real estate acquisition activities have been completed, or are close to completion.

V. TREASURY FORFEITURE FUND

In FY 2019, DHS received \$601 million from the TFF for border wall construction. Because Treasury funds were redirected from other law enforcement purposes, DHS will end border wall construction funded with TFF funds; terminate contracts after ensuring tasks needed to protect life, safety, and the environment are completed; and return any excess funds to the TFF. More specifically, DHS has returned unobligated TFF funds (approximately \$455 million) to Treasury and will return any recovered amounts to Treasury once those funds become available in DHS's account.

VI. This Plan is not intended to and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, or agents, or any person.